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Nos. 300 - 301

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Supreme Court of the United States

OCTOBER TERM 1931

SOUTHERN RAILWAY COMPANY, ... Appellant,

versus

COMMONWEALTH OF KENTUCKY, by, &c., . Appellee.

ANDREW W. MELLON, Director General of Railroads, ... Appellant,

versus

COMMONWEALTH OF KENTUCKY, by, &c., . Appellee.

BRIEF FOR APPELLEE

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SOUTHERN RAILWAY COMPANY, ... *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, EX REL. ETC., *Appellees,*

AND

ANDREW MELLON, DIRECTOR GENERAL OF RAILROADS, ... *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, EX REL. ETC., *Appellee.*

BRIEF FOR APPELLEE

By Section 4077 Kentucky Statutes every railroad company and every other like company exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service shall annually pay a tax on its franchise. By Sections 4078-4087 where the lines of the company lie in Kentucky and elsewhere, the entire net earnings are ascertained and the value of the franchise is fixed and that proportion of this valuation is apportioned to Kentucky as the proportion that the length of the lines in Kentucky bears to the total length of the lines of the company. The statute has been upheld by the Court of Appeals of Kentucky, and on appeal by this court. The franchise tax is a tax on the intangible property of the

corporation. Henderson Bridge Co. v. Kentucky, 99 Ky. 623, 166 U. S. 150; L. & N. R. R. Co. v. Greene, 244 U. S. 545; Illinois Central R. Co. v. Greene, 244 U S. 555. In providing for a mileage basis in fixing the value in Kentucky, the statute followed the rule often approved by this court. State railway tax cases, 92 U. S. 608; Western Union v. Mass., 125 U. S. 520; Pittsburg R. Co. v. Backus, 154 U. S. 521; Adams Express Co. v. Ohio, 165 U. S. 194.

By Section 4241 Kentucky Statutes a judicial proceeding is provided for the assessment of property omitted from assessment. This proceeding was instituted pursuant thereto to list for assessment the Southern Railway Company, which had made no report to the Kentucky authorities as required by the statute and had concealed from them the fact that it was doing business in Kentucky and operating in other names its property in the state. Two actions were filed; one (R 1) including the years 1914, 1915, and 1916, the other the years 1917 and 1918 (R. 57). During the first three years the Southern Railway Co. did not own and operate the Cincinnati Southern Railway. During the last two years it did own and operate this long and valuable line in Kentucky, (R. 182). The actions were heard together. Judgment was entered in the lower court in favor of the defendant (R. 94), and on appeal was reversed by the Kentucky Court of Appeals, see Commonwealth, By Etc. v. Southern Railway Co., 193 Ky. 474. (R. 150.) On the return of the case to the lower court judgment was entered in favor of the plaintiff (R. 184), and on appeal the judgment in this case was affirmed by the Kentucky Court of Appeals, although the judgment in the other case heard with it for the taxes of the years 1914, 1915, and 1916 was reversed; and that was the end of that case. See Southern Railway Co v. Commonwealth of Kentucky, 204 Ky. 388 (R. 194) The railway company appealed

from the judgment in this case to this court and it was reversed, Southern Railway Co. v. Kentucky, 274 U. S. 76. On the return of the case to the lower court, additional pleadings were filed and the issues being made up (R. 236) and the case submitted, judgment was entered in favor of the plaintiff in the same amount as in the former judgment. (R. 278-287.) On appeal from that judgment to the Kentucky Court of Appeals it was affirmed, see Southern Railway Co. v. Commonwealth, 238 Ky. 638. (R. 290.) The railway company prosecutes this appeal from that judgment. We can not better state the case as now presented than it is stated in the opinion of the Court of Appeals, and especial attention is asked thereto, as a part hereof. (R. 290.)

The case as now presented to this court comes simply to this: Shall appellant be taxed as all other taxpayers? Or shall it be adjudged without right an exemption from taxation? The taxes against all other railroads in the state have been assessed exactly as the taxes of appellant have been assessed by the judgment herein. All others have paid their taxes. If the judgment herein is not enforced, appellant will simply obtain an exemption from taxation to which it is not entitled. It was not taxed as other railroads simply because it concealed the facts from the state authorities. If this plan of operating owned lines in other names and concealing the truth obtains an exemption from taxation here, the door is opened for countless frauds on the state. We ask the careful attention of the court to this.

The main contention here is that the matter is concluded by the opinion of this court on the former appeal. But this court did not then adjudge the case which is now presented. The record that went to this court was a copy of the record in the Kentucky court, which is before you on this appeal. That record only showed in the judgment the amount of taxes assessed. It did not

show how this amount was reached or upon what basis it rested. The figures upon which the result was reached were not in the record. The petition upon which the recovery was had only set up the ownership of the line from Louisville to Danville, and the case was argued before this court on the basis that the assessment was only rested on this little line and was confiscatory. That the court may clearly see this we call attention to appellant's brief in this court on that appeal on which the opinion of this court was written.

This court, not having in the record the figures showing how the assessment was made and looking to the pleadings for the issues before the court, thought that the assessment was too large, but this conclusion was due to the condition of the record. The fact is there was a mistake in the record. Our amended petition, was by some mistake never filed or made part of the record and we did not observe this when the case was in the Kentucky court, as no question was then raised on the subject.

This court did not mean to adjudge appellant an exemption from taxation or to adjudge that it might not be taxed just as all other railroad companies are taxed. It did not have enough before it to show that this had been done and it rested its conclusion entirely on what was then before it. A very different case is presented by the record as it now stands. This court will have no difficulty in affirming the judgment as the facts are before it and it sees that appellant is taxed just as all other like corporations; for it has affirmed the judgments of this kind in the following cases in which the facts as to the calculation of the assessments in such cases are fully set out: Henderson Bridge Co. v. Kentucky, 166 U. S. 150; Adams Express Co. v. Kentucky, 166 U. S. 171; L. & N. R. Co. v. Greene, 244 U. S. 522; I. C. R. Co. v. Greene, 244 U. S. 555.

In Mutual Life Ins. Co. v. Hill, 193 U. S. 557, the rule as to the effect of former appeals is thus stated:

> "While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded, even though all are not specifically referred to in the opinion, yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what question may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

Again in Messenger v. Anderson, 225 U. S. 436, the rule is thus stated:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. King v. West Virginia, 216 U. S. 92, 54 L. Ed. 396, 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co. 198 U. S. 95, 99, 100, 49 L. Ed. 959, 25 Sup. Ct. Rep. 577; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 343, 40 L. ed. 991, 993, 16 Sup. Ct. Rep. 850. Of course this court at least, is free when the case comes here."

The opinion of this court on the former appeal rests in the end on these statements in the opinion:

> "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accord-

ance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto. The Mobile and Ohio, the Cumberland Railroad, and the Cumberland Railway were held not to be a part of the system. . . . . The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway Company in Kentucky of $13,555 per mile for 1918 and $23,730 for 1919."

The judgment on this appeal rests on the ground that there is a claim for taxes in respect of the Cincinnati line. This is the most valuable line in the system. The fact that it was not owned and operated by appellant in the years 1914, 1915, and 1916, was the reason that the action to recover the taxes for these years was dismissed, for without this line the other lines in Kentucky were not connected with the Southern Railway Company System. For this reason too in the first opinion the court of appeals, 193 Ky. 474, it was held that the Mobile and Ohio, the Cumberland Railroad and Cumberland Railway could not be considered, because as the case was then presented these were disconnected lines. But this contention was never made after it was shown that appellant owned and operated the Cincinnati-Southern. The court knows that a line from St. Louis to Mobile must cross a line from Cincinnati to New Orleans. To avoid all confusion on this subject we moved the court to omit these lines in making the assessment and the appellant objected, for to omit them would be to increase the assessment. We took no cross-appeal from the judgment, believing that the court was right as the Court of Appeals opinion, on the first appeal, should be confined to the facts then before the court. Certainly appellant can not complain that it obtained the lower assessment which it then claimed was all it was liable for in any event.

The figures given in the second quotation above made from the opinion are obtained by dividing the amount of the assessment by 127.65, the length of the line from Danville to Louisville, Kentucky. Not so here, the assessment is based on 424.64 miles of railroad in the state and is only about one-third as much per mile as the assessment the court there held excessive. To say that the judgment of this court holding an assessment of 127 miles excessive is conclusive that a like assessment of 424 miles at the same amount is excessive is simply without reason.

This court on the former appeal only held that there being no claim for taxes in respect of the Cincinnati line, the assessment simply rested on the line known as the "Southern Railway in Kentucky," 127 miles long and was an excessive assessment on this line. The figures given in the opinion show this. The holding that the assessment made on this basis was excessive is not a holding that no assessment could be made on a proper basis. The opinion on the former appeal only reversed the judgment for further proceedings. The record then before the court did not show how the result was reached. Not so now. Every fact necessary for the calculation of the amount is stipulated in the new record (R. 270). Taking the figures so stipulated it is no trouble to follow the statute which is fully set out, explained and upheld by this court in L. & N. R. Co. v. Green, 244 U. S. 522.

The facts of this litigation can thus be summarized:

1920. Suit filed in the county court of Woodford County, Kentucky, seeking to assess for taxation an omitted portion of the intangible property of the Southern Railway Company of Virginia, and alleging that the

Southern System was doing business in Kentucky, but had filed no report.

1921. First opinion of the Court of Appeals (p. 150), 193 Ky. 474, 237 S. W. 11; holding that the Southern System was in fact doing business in Kentucky and liable for taxation on a system basis, when the amount due had been determined.

1924. Second opinion of the Court of Appeals (p. 194), 204 Ky. 388, 264 S. W. 850; dismissing and reversing an assessment for 1914 and 1916 for lack of a physical connection, but affirming without discussion the assessment for 1918 and 1919.

1927. Opinion of this court, 274 U. S. 76, 71 L. Ed. 934, holding that the Southern System was doing business in Kentucky; that there was no claim for taxes on the part of that system operated under the name of the C., N. O. & T. P., and that the amounts assessed were arbitrary and excessive.

1930. Third opinion of the Court of Appeals (p. 290), 238 Ky. 638, 38 S. W. (2d) 696; affirming the assessment, after an amended statement had been filed making claim against the Southern System as operated in Kentucky and including specifically that portion of the system operated under the name of the C., N. O. & T. P.

This appeal offers a new case to this court. The pleadings are new. The evidence is new, for additional facts were stipulated on the return of the Woodford Circuit Court. The amounts assessed for each year, 1917 and 1918, are the same as on the prior appeal to this court. But the case is not the same and appellant is estopped to so maintain; for on the former appeal it maintained that the assessment then before the court was an assessment on only 127 miles of railroad and

nothing more. This appeal reduces itself to a single question:

> "IT BEING ADMITTED THAT THE SOUTHERN SYSTEM WAS DOING BUSINESS IN KENTUCKY, FOR THE YEARS IN QUESTION, IS THAT SYSTEM LIABLE FOR TAXATION LIKE OTHER CARRIERS IN THE STATE?"

On the first appeal to this court there was no statement or pleading which made any claim for taxes on account of the operation of the C., N. O. & T. P. in Kentucky by the Southern System. So that there really was no claim for taxes on that division of the system. On the return of the case to the Woodford Circuit Court an amended statement was filed in which this claim was set up. Thereupon additional stipulations were filed and with this additional matter in the record appears another case. The pleading is not the same, nor is the evidence the same. The new pleading appears in the printed record on pp. 236-242, and the additional stipulations on pp. 270-277.

We have read with care the elaborate brief filed for appellant. It stands admitted that appellant during the years in question was doing business in Kentucky. It stands admitted that under the decisions of this court, and of the Kentucky Court of Appeals it was liable to the tax in question just as other corporations doing like business in Kentucky. It stands admitted that appellant was not taxed because it concealed the facts from the Kentucky taxing authorities. It stands admitted that all other corporations doing like business in Kentucky have been taxed just as appellant's taxes have been fixed in the judgment and that they have paid their taxes. If the judgment appealed from does not stand, appellant will simply obtain an exemption from taxation to which it was not entitled; for under the Constitution of

Kentucky the burden of the public taxes must fall on all like taxpayers equally. Certainly the opinion on the former appeal leads to no such result. "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." Mutual Life Ins. Co. v. Hill, 193 U. S. 554; Chas. Wolf Packing House v. Court of, Etc., 267 U. S. 552.

The questions discussed and decided on the former appeal were that the assessment then before the court was an assessment on the 127 miles of railroad, known as the Louisville Southern and that the amounts fixed amounting to so many dollars a mile on this line was excessive. These are the only questions determined in that opinion. Certainly it can not be deduced from that opinion that appellant can not be assessed just as all other like taxpayers. That opinion rests on the ground, as therein expressly stated: "There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific." The case now presented rests expressly on this claim. The decision then made that the assessment was excessive because resting on only 127 miles of railroad is not a decision that a like assessment on more than three times as many miles of railroad is excessive. Appellant now insists that the facts being stipulated, it was not material that the facts were not pleaded and that so there was then a claim for taxes in respect of the Cincinnati lines. But this is to assail the opinion not to follow it. The opinion holds that there was no claim for taxes in respect of these lines and its conclusion that the assessment was an assessment on only the Louisville Southern line of 127 miles and so was excessive rests on this holding. When it so held, it decided all that was before it. Anything further said in the opinion as to these lines or a claim of

taxes in respect thereof was on a matter not then before the court; for as the court expressly held no claim for taxes in respect of the Cincinnati lines was then presented. The figures given in the opinion, no less than its words, permit no other conclusion. While the assessment now before the court is in the identical figures as the assessment then before the court it rests on 424.65 miles of railroad in Kentucky and not on 127 miles, which the court then held the assessment then before it rested on. There was no showing then how the "identical figures" were obtained or how all other like corporations were assessed. Now it is shown how the "identical figures" were obtained, and that all other like corporations were assessed in the same way. (R. 270-275.) The judgment rests on pleadings and facts not then before the court.

The appellants can not complain that the Mobile & Ohio and the Cumberland Railway lines were not included in the assessment under the original stipulations. There had been included the mileage, the earnings and some outside tangible values of these lines; and if the lines themselves came out of the case it was of course necessary to remove from the totals all earnings and all mileage and all valuations of the M. & O. and the two Cumberlands. The old figures which were used on the first appeal to this court were:

1917 SOUTHERN RAILWAY SYSTEM

Inclusive of the Mobile & Ohio and the Cumberlands.

Total mileage of system	10,098.53 (p. 262)
Total earnings of system	$36,776,734.50
Kentucky Mileage	424.64 or 4.209 per cent.

But leaving out these lines the figures for this case become:

1917 SOUTHERN RAILWAY SYSTEM

Exclusive of the Mobile & Ohio and the Cumberlands.

Total mileage of system	8,914.22 (p. 286)
Total earnings of system	$33,673,556.09
Kentucky mileage	363.28 miles or 4.075%

The second year, 1918, the figures are almost identical and appear on the same pages of the printed record. On this basis the Southern System was operating the following mileage in the borders of Kentucky:

Southern in Kentucky, Main line	127.62 miles
Southern in Kentucky, Trackage	38.16 "
C., N. O. & T. P.	197.50 "
Total	363.28 miles.

And as the total system mileage was 8,914.53 miles, the proportion in Kentucky must be 4.075%. It is also necessary on this basis to correct the net operating railway income by taking out the earnings of the Mobile & Ohio and the two Cumberland lines, and also necessary to subtract the excess tangible valuations of the Mobile & Ohio for its foreign terminals, double tracks, etc.

The true Southern System was doing business in several states, including Kentucky, and in Kentucky had seen fit to do business under two names: (1) Southern in Kentucky, (2) C., N. O. & T. P. The system-unit operated, owned and controlled this Kentucky mileage within the meaning of the Kentucky statute. It is further stipulated that all of the whole system, including this Kentucky mileage, is a unit of operation. The separation of accounting may be used by the Southern System for its own purposes, but a system of accounting can not change the law with reference to the right of the state to levy taxes on a unit operation of railway lines.

The stipulations set out fully the usual method used in the computation of such taxes (p. 271). Including the M. & O. and the two Cumberlands, the figures work out for each year:

Omitted Valuation	1917	$1,730,090.02	(p. 271)
	1918	3,028,592.62	(p. 272)

But EXCLUDING the M. & O. and the two Cumberlands (which is this case), they become:

Omitted Valuations	1917	$1,482,243	(p. 286)
	1918	3,755,034	(p. 287)

All this was presented to the judge of the Woodford Circuit Court, and his reasoning is summed up in the following, the defendants objecting to the assessment being made on the other basis:

> "On the whole record the lines in Kentucky as a whole made large net earnings and were fairly representative of the system for the years in question, and that therefore under the statute the mileage basis should be applied." (P. 279.)

Thus on the whole case that court found that the mileage valuations within Kentucky were not substantially less than the system mileage valuations, and this being the case an assessment on a system-unit basis becomes proper. Excluding these lines the omitted valuation would be:

1917	$1,482,243	
1918	3,755,277	See Exhibit X
Total for two years	$5,237,277	pp. 286-287

Including these lines the omitted valuation is:

1917	$1,730,090.02
1918	3,028,592.62
	4,798,682.64

These are the same figures which were before this court on the first opinion. But it will be noted that the sum of the judgment is some half million dollars LESS than if these lines had been excluded. When the case came on for trial in the appellate court we took no cross appeal, and since the system-unit is not injured by the result of the judgment appellant will not be heard to complain of the figures. Compare Judge Logan's opinion (p. 290 at 310-311), 238 Ky. 637, 658. For the amount of taxes payable under the judgment is a less amount than the system would have to pay under the figures set out in our Exhibit X. (R. 286-7.)

It has always been recognized that trackage rights come under the same rule as operated mileage: See Jefferson v. Board, 25 Law R. 1637, 78 S. W. 443. And as we understand this use of trackage rights has been so universal that it is now conceded by all taxpayers and of course must apply to this case. It is earnestly submitted that this court overlooked the trackage rights of 38.16 miles in its former opinion, and possibly in some way got the figure mixed with the Kentucky, Mobile & Ohio mileage, which was 38.63 miles (p. 48).

Appellant was certainly doing business in Kentucky in the years 1917 and 1918. There is this stipulation as to the Cincinnati line:

> "Effective January 1917, the executive and other officers of the defendant, Southern Railway Company, became the corresponding officers of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since January 1917, there has been unification and consolidation for supervision of operation of the said Cincinnati, New Orleans & Texas Pacific Railway Company into the Southern Railway system. Since January 1917, the cars and engines of the Cincinnati, New Orleans & Texas Pacific Railway Company have been marked 'Southern,' and at all of the stations of the Cincin-

nati, New Orleans & Texas Pacific Railway Company, the bulletin boards had on them 'Southern Railway System,' and on the caps and uniforms of the conductors there was the word 'Southern.'" (R. 182.)

In addition to this the reports made by the corporation to its stockholders are filed (R. 134-147) and the accompanying maps. On these maps the Southern Railway is printed in red, the Cincinnati Southern in blue, stock controlled roads operated under separate management in green and these words are printed on the margin:

Red	Southern Railway.	Southern Railway System
Red	Cincinnati, New Orleans & Texas Pacific Ry.	
Red	Alabama Great Southern Railroad	
Blue	New Orleans and Northwestern Railroad	
Red	Harriman & Northeastern Railroad	
Red	Northern Alabama Railway	

When the executive and other officers of the Southern became the corresponding officers of the Cincinnati-Southern, plainly the former was merged in the latter. All the money received went into its treasury and was disbursed by its officers. If it was not operating this line, it was not operating any; for all its lines were controlled by the same officers.

In addition to this is the following allegation in the defendant's answer: (R. 177.)

"That in January 1917, the defendant, Southern Railway Company, controlled the Alabama Great Southern Railroad Company through ownership of a majority of its capital stock; that in January, 1917, the defendant Southern Railway Company and the Alabama Great Southern Railroad Company acquired a majority of the capital stock

so that the defendant Southern Railway Company could and did control through stock ownership the Cincinnati, New Orleans and Texas Pacific Railway Company from January, 1917, to the present time."

This line was therefore a stock controlled road during the years in question, not operated under its separate management but by the management of the Southern. So it is printed in blue on the maps and included in the Southern System.

These facts bring the case within the rule often laid down by this court in like cases.

"Identity of interest could not be clearer or closer than it was between the defendants in the two cases, they represented precisely the same, single interest, and the Hart Company and Wood, as agents of the Elyria Company, were obviously and necessarily privies to the judgment rendered in its favor in the circuit court of appeals for the sixth circuit. Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294."

"While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being but a part of the latter, acting merely as its agent, and subject in all things to its proper direction and control." Southern R. Co. v. Lowe, 247 U. S. 330.

"The management and control of all the operations of the Eastern Company have always been kept in charge of a 'managing committee' of two members, one of whom for many years before the evidence was taken was the general manager of the Omaha Company and the other the general superintendent of the Milwaukee Company. The Eastern Company did not pay either of these men any salary for their services.

"The auditor of the Omaha Company has been the auditor of the Eastern Company, which paid no part of his salary, and the established practice

has long been for the one bookkeeper of the Eastern Company to take his journal and ledger to the auditor of the Omaha Company monthly for verification.

"Seven of the nine directors of the Eastern Company at the time the evidence was taken were officers either of the Milwaukee or Omaha Company; the eighth, the attorney of the Eastern, had desk room in the Milwaukee Company's legal department, of which he had recently been a member; and the ninth director, the president, was not an employee of either, of the two owning companies.

"With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that because it is technically a separate legal entity the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public." Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Assoc., 247 U. S. 484.

"The petitioner did not itself do the business of its subsidiaries and have possession of their property, as in Southern P. Co. v. Lowe, 247 U. S. 330, 62 L. Ed. 1142, 38 Sup. Ct. Rep. 540, but the principle of that case must be taken to cover this." Gulf Oil Corporation v. Lewellyn, 248 U. S. 71.

"We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the 16th Amendment and income tax laws enacted thereunder." United States v. Phellis, 257 U. S. 156.

"Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company." Davis, Agent, v. Alexander, 269 U. S. 114.

> "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires." Adams Express Co. v. Ohio, 166 U. S. 225.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, and other like cases have no application for those cases involved only formal matters and the court there pointed out that a different rule applies in cases 'concerning substantial rights.' In Philadelphia, Etc., R. Co. v. McKibbin, 243 U. S. 264, only a question of process served on the president of the corporation while passing through the state, was involved. This is made plain by the court's opening statement.

Certainly if a liability for tort or the taxes due the United States can not be defeated by corporate forms, the taxes due the states can not be so defeated; and there is much stronger reason for so applying the rule than in the case of a former judgment against the subsidiary or for a tort committed by it.

As to the Louisville-Southern the admitted facts are these:

1. The Virginia corporation bought the property and paid for it. (R. 102.) 2. The system has full authority to and does route over the Kentucky line to destination both freight and passengers. (R. 97). 3. The officers, from president to general counsel, are the same men. (R. 83-4.) 4. The Kentucky line has bought no new rolling stock since 1894; but the parent system has maintained the then existing rolling stock at the same

amount without cost to the Kentucky line. (R. 95.) 5. All money collected by the Kentucky line was paid into the system's treasury; and by said system disbursed. (R. 103.) 6. From and after January, 1917, the Southern Railway System in its own name, owned and was doing business in the state of Kentucky over the lines of the Cincinnati, New Orleans and Texas Pacific Railway Company and as such owned and was operating 197.5 miles of line into which the Southern Railway in Kentucky terminated. (R. 177, 182.) After February, 1917, the whole line was marked at stations and bulletin boards "Southern Railway System." (R. 182.)

In its report to its stockholders "Miles of road, June 30, 1917, owned" are these words: (R. 137.)

Louisville, Kentucky, to Cincinnati Southern, Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60

In its report for 1918 under the "Miles of road owned" are these words: (R. 143.)

Louisville, Kentucky, to Cincinnati Southern, Junction, Ky. (So. Ry. in Ky.)	83.47
Versailles, Ky., to Georgetown, Ky. (So. Ry. in Ky.)	16.74
Lawrenceburg, Ky., to Lexington, Ky. (So. Ry. in Ky.)	23.60

How could any court without shutting its eyes to the truth doubt that these two lines were in 1917 and 1918, owned and operated as part of "the Southern System?"

The Cincinnati line connecting with its other lines gives it a through line from the whole south to Cincinnati and all the cities north of it. The Louisville line connecting with the Cincinnati lines at Danville, Kentucky,

gives it a through line from the whole South to Louisville, Indianapolis, St. Louis and other western cities. The present Constitution of Kentucky took effect September 28, 1891. By section 171, it provided that "taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." The statute levying this franchise tax reading just as it now reads took effect November 11, 1892. The Louisville line was sold under the court's decree on August 16, 1894, and was bought by the Southern Railway Company, which then organized the Southern Railway Company in Kentucky to evade the statute passed about two years before. The statute was upheld by the Court of Appeals sustaining an assessment for 1893 and the judgment was affirmed here, Henderson Bridge Co. v. Kentucky, 99 Ky. 625, 166 U. S. 150. Southern R. Co. in Ky. v. Coulter, 113 Ky. 657, involved the taxes for 1896. The statute has since been uniformly enforced. Under it all railroad systems whose lines are in part in Kentucky, such as the Illinois Central, the Chesapeake & Ohio and the Louisville & Nashville, pay the tax after fruitless appeals to this court. Is there any reason why the Southern Railway system should be exempt from the burden all other systems bear? It enjoys every right they enjoy and accomplish just what they accomplish by reason of through lines and the long haul. These corporations took the Kentucky lines and operated them in their own names. If the Southern had done the same thing, would anyone believe that this controversy would ever have arisen? If not, the only question presented is, can it by a mere corporate form defeat the statute or while really owning and operating these lines can it by mere name in which it acts escape a tax which it would pay if it did these things in its own name? The question is an important one, not only to Kentucky but to nearly every state; for nearly all the states have now similar statutes and

it will be easy for every railroad system to do just what this one has done and operate its lines in each state in a different name, and they will do it and so escape franchise taxes in the states where the lines are operated, if this court sustains this appeal. We can not believe that this court will sustain such a patent evasion, and enunciate a rule that would unsettle and destroy all it has written on the subject in the last fifty years.

The exhaustive opinion of the Court of Appeals on the first appeal is printed in the record (pp. 150), and we ask the special attention of this court to it without repeating here the reasons given for the judgment. It is earnestly submitted that to hold otherwise would have been for that court to shut its eyes to the truth and ignore the entire current of authority on the subject.

THE TAX IS ONLY ON PROPERTY IN KENTUCKY

In addition to its tangible property a large railroad system must have a large capital sufficient to operate it. This capital, as this court has often held, is distributed along its lines and is subject to taxation in the states where the lines are operated. There was no taxation here of any property not within Kentucky. The assessment was made just as it would have been made if the corporation had operated the Kentucky lines in its own name and it is written large on the record, that if it had so operated the Kentucky lines, this case would not be here.

> "The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole; and each part of the road contributes, not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and con-

nected operation of the whole. This is no denial of the mathematical proposition that the whole is eual to the sum of all its parts; because there is a value created by and resulting from the combined operation of all its parts as one continuous line.

"Now, when a road runs into two states, each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes, what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road." Cleveland, C., C. & St. L. R. Co., v. Backus, 154 U. S. 444.

Plainly as the corporation was operating two lines in Kentucky it was liable to some franchise tax in Kentucky, and there is no showing even now that the amount fixed is excessive. It is entirely immaterial whether the Louisville line made money or didn't make it, counting merely the receipts on that line. It brought to the corporation the business to and from the south, to and from Louisville, Indianapolis, St. Louis and other western cities. Its real value to the corporation was as a feeder. It makes the line appear as operated at a loss, by bookkeeping, charging up to it equipment supplied and the like (R. 95-96) but the system is the thing. The line is a part of the system. Some part of the capital operating the system must be apportioned to the Kentucky lines. What that part should be was a question to be determined by the circuit court. Its decision as to the amount was not only acquisced in but on appeal to the Court of Appeals was expressly conceded to be correct. The Kentucky Statute does not provide that the mileage shall control in making the assessment. It only provides that it shall be considered. In the absence of any complaint in the state courts on this subject it must certainly be presumed here that the state courts acted properly and that the assessment is fair.

The Kentucky Statute includes in the system lines "operated, owned, leased, or controlled." It is held that lines held by stock control are included, L. & N. R. Co. v. Greene, 244 U. S. 522. In this case the corporation both operated and controlled the Cincinnati and Louisville lines. Such lines out of Kentucky were counted by this court in the above case to lower the proportion of the lines in Kentucky to the whole lines. If they may be so counted, they must be in like manner counted when they swell the proportion in Kentucky.

There is no showing here that any property not within the state was included in the assessment. In Delaware, Etc., R. Co. v. Pennsylvania, 198 U. S. 341, it was shown that the corporation owned coal of the value of $1,700,000.00 which was necessarily included in its capital stock upon which the tax was charged. It does not appear here that any property outside of Kentucky was included in the valuation. For all that the record shows every dollar of such property was deducted, as it should have been. This is the distinctive feature of the case, Louisville, Etc., Ferry Co. v. Kentucky, 188 U. S. 385. The fact that property having its situs in Indiana was included in the assessment, appeared in the record. The same is true of Wallace v. Hines, 253 U. S. 66; it did appear that the bonds and land grant having a situs in another state were included in the assessment. In Union Transfer Line v. Wright, 249 U. S. 275, it appeared that more cars under the statute were assessed than were in fact in the state, as shown by express stipulations.

The contention that the assessment is unwarranted and is a taxation of property not in this state is wholly without foundation in the record. The only substantial ground attempted to be made out is the showing that the line from Louisville to Danville and its branches known as the Southern in Kentucky, lost money; but there was

never a railroad system in which some of its branches did not lose money, and there is no attempt to show that the lines in Kentucky as a whole lost money or that they were not equal to the average of the system in profits. In fact the Cincinnati Southern is the most profitable line of the system. (See R. 177.) If anything was lost on the Southern in Kentucky it was more than made up in Kentucky. Therefore, appellant made no attempt to show that the Kentucky lines as a whole fell down. The burden was on it to show this to make out any ground for relief on this ground; for the tax is based on all the Kentucky lines. Not only so, this line connects the system with Louisville, Indianapolis, St. Louis and the West. See maps on stockholders reports. It thus brings business to the system for long hauls and its value is not determined alone by the cash taken in on it.

"Through passenger trains were run from St. Louis, Missouri, to Danville, Kentucky, but no further." (R. 175.)

Back of all this the claim that this line lost money rests alone upon appellants' bookkeeping. As you will see from the stockholders reports (R. 148, F, G, H, & I), there was a charging in 1917 against this line for hire of freight cars, debit balance $431,246.00, also joint facility rents, $153,697, and these two items alone about equal the alleged shortage.

Now how did this come about? The line was originally known as the Louisville Southern Railway. Being a short line it had only a few engines or cars. It failed and was bought by the Southern. Then to dodge Kentucky taxes it did not operate the line in its own name, but organized the Southern in Kentucky and these facts are stipulated: (R. 95.)

"When the Southern Railway Company in Kentucky acquired the property of the Louisville South-

ern Railway Company in 1894, it also acquired the following equipment, viz.:

Steam locomotives	25
Box cars	609
Flat cars	47
Stock cars	70
Caboose cars	12
All classes of freight cars	738
(Fol. 145) Coaches	15
Combination passenger cars	3
Baggage and express cars	5
All classes of passenger cars	23
Derrick cars	1
Other company service cars	7
All classes of company service cars	8
All classes of cars in service	769

"Since that time above named equipment has been used by the Southern Railway Company in Kentucky in common exchange with the defendant, Southern Railway Company of Virginia, that is, portions of the equipment above named have been used by the Southern Railway in Kentucky, and portions of the Southern Railway Company of Virginia outside of Kentucky, but where any of this equipment is used by the Southern Railway Company of Virginia, such use by the Southern Railway Company of Virginia, was without charge to that company, in connection of that company's furnishings to the Southern Railway Company in Kentucky a like number of engines or cars without charge to the Southern Railway in Kentucky.

"When any of the above equipment has become out of repair or unfit for service, it has been replaced by the Southern Railway Company of Virginia without cost to the Southern Railway in Kentucky; so that for every period of time from 1894 (Fol. 146) up to and including the present time, the Southern Railway in Kentucky owns the same number of locomotives, freight and passenger

cars, etc., that it did in 1894 and has reported each year and tax paid each year on the same description and value of equipment as on hand September 17, 1894.

"Southern Railway Company in Kentucky has bought no equipment since 1894. Whenever the Southern Railway Company in Kentucky has needed additional equipment to that stated in stipulation 2, it is leased for such use equipment of the defendant, Southern Railway Company of Virginia, as well as equipment of other various railroad companies, and has done this under the usual traffic arrangement obtaining among railroads, and for such use of equipment has paid to the defendants, Southern Railway Company of Virginia, and other railroads, the regular charges for such hire of equipment." (R. 96.)

Of course this line can not with the little equipment it had do the business of the Southern System with Louisville and the West. So the Southern furnishes the cars and engines at the rates usual between railroads. These rates are fixed very high to bring equipment home. Otherwise much would be kept indefinitely. We all know this. It is a matter of common knowledge that no railroad company could live on any such basis. The joint facility rents are not paid for this line. They are paid for the system.

The defense is on a par with all the other conduct of appellant. It started out to dodge Kentucky taxation. For this reason it made this dummy corporation. (R. 102-3.) For this reason it ran the Cincinnati line in the name of the Cincinnati, New Orleans and Texas Pacific until we uncovered the pretense in this suit. For this reason it maintained on the first appeal that the Mobile and Ohio did not connect with its system. For this reason it left a little gap in the City of Louisville, which it claimed not to own so that its line to the West did not connect with the Southern in Kentucky. For this reason

it framed its contract and kept its books with the Southern in Kentucky so as to make a showing of no profits but a loss, when the fact is there is not another short line in Kentucky doing as much business and appellant has not another short line so necessary to the system as this line.

There was never in all the history of this court a more cold-blooded, persistent and groundless attempt to evade Kentucky taxation justly due. The defense has not a foot to rest upon in the facts.

The Assessment as Made is Valid

The whole record, and the four opinions seem to us to establish the following:

1. The Southern System is doing business in Kentucky.

Commonwealth v. Southern Ry., 193 Ky. 474, 237 S. W. 11 (p. 150).

Southern Railway v. Com., 204 Ky. 388, 264 S. W. 850 (p. 194).

Southern Railway v. Kentucky, 274 U. S. 76, 71 L. Ed. 934.

Southern Railway v. Com., 238 Ky. 638, 38 S. W. (2d) 696 (p. 290).

2. The said system failed to report its unit operation to the Kentucky taxing authorities; but did report the operations of the controlled lines as separate units.

3. The names under which the system operations were reported to the state taxing authorities are:

a. C., N. O. & T. P.
b. Southern Railway in Kentucky.

4. An assessment made in the ordinary way, just as other similar railroads are assessed in Kentucky, shows that the system unit of the Southern has not paid

taxes in Kentucky on an average valuation using the whole system-unit as a basis.

5. This difference in assessed valuations, must be omitted intangible system property omitted from Kentucky taxation, and here taxable: unless the result is so arbitrary and unreasonable as to tax property outside the state.

It is to this last point—confiscatory taxation—that we want to direct the court's attention. The Southern System keeps a very extended set of books, and figures each road, line and division for its own results (p. 148a, etc.). By reason of this method of keeping books, we were able to produce in court full figures showing the income and expenses of each little section of the system-unit, including the operations with this state, under the two names used. However it is freely admitted that traffic moves as a unit over a unit system; and the special accounts are kept largely for the company's convenience; and all the funds go into a common treasury.

The earnings of each separate ledger, when summed together show that the annual earnings of this system-unit is about

$3,600 per mile (p. 262-263)

This is the average of each of the ten thousand miles, including the operations within this state.

The operations within Kentucky runs as follows:

Earnings, 1917		
C., N. O. & T. P.	$14,763.93	
Sou. in Ky.	878.19	
	$15,642.02	(pp. 261, 262)
Earnings, 1918		
C., N. O. & T. P.	$9,037.11	
Sou. in Ky. (loss)	4,742.13	(pp. 262, 263)
	$4,294.98	

It is earnestly submitted that these figures have a positive meaning here. For the system earnings run evenly for the two years, and show a net variation of less than $25 per mile. The earnings on the Kentucky mileage varies greatly, moving from fifteen thousand to four thousand in the two years. And this seems to us to illustrate the propriety and justice of making an assessment on the system-unit basis; because a large unit is subject to less violent fluctuations from year to year as business conditions in a single state may be different for local reasons alone.

As we see it, this same system-unit admittedly doing business in Kentucky, has kept its books on two of its unit-operated and indivisible divisions showing that one of these fingers is making more money per mile than the system and that the other finger is making less money per mile than the system. But these two fingers are the UNIT itself within the State, and when the system is in Kentucky it must be subject to like rules of taxation as are also other carriers. Besides system-unit taxation necessarily produces uniformity; well illustrated by the earnings of the Kentucky sections of the system: which earnings run for 1917 some five times that of the system per mile; and for 1918 run some 30% greater than the system mile.

The state has pleaded in this record by amended statement and there makes a claim for taxes due from the whole system-unit, including this C., N. O. & T. P. finger: a division which is obviously profitable not to say prosperous. The names used on the books of the system are merely terms for its convenience in accounting; and a method of several accounting can have no bearing on computation of taxes under a general law. For this taxing statute applies to all corporations performing a public service: and the method of figuring out the amount due—which method is used as we have just

outlined—is that used in all other cases, e. g., the Illinois Central, Louisville & Nashville, Chesapeake & Ohio, etc. The Southern Railway System must come under the same general statute; and where that statute is applied, as here, is treated in just the same manner. Any other method of computation is objectionable as a special concession (be that concession up or down) to one taxpayer, which other like taxpayers do not receive. The result which we are asking is only uniformity of taxation, nothing more.

The system unit of taxation has been so often approved by this court that we will not repeat the authority or the reasoning. But we do think that it is not common sense or good business to operate the fingers of the same hand into earning units, for tax purposes. For it is the whole hand that produces the result. And it does not become the thumb to demand special consideration over the middle finger; or the little finger over the wrist.

Therefore the Southern System, being in Kentucky for purposes of operation, must also be in Kentucky for purposes of taxation as other railroad taxpayers. Whether called the C., N. O. & T. P. or the Southern in Kentucky, or other name or names: the system is doing business in Kentucky, it is a single functioning unit; and comes under the same law as other systems. Under that law, the state is not permitted but is required to lump together the system's earnings both earnings collected within and without the state. In treating the earnings within Kentucky it must also use the total Kentucky earnings without reference to which ledger, may be used to enter those monies collected.

Such a diverse system of books could be carried to a most remarkable conclusion. Railroad accounting would forget all unity. A general breakup of the system for taxation would come immediately. Every little branch,

or "dummy line" would be a several loss: for many such small feeders are run at a loss. Every terminal would show the creation of a number of new taxing divisions, each keeping its own figures; and some of which would show one result of profit per mile and others a result of losses per mile. In this was uniformity and unity of taxation would be lost.

On the other hand, the system-unit is the basis of the operation and management; and is sensibly used for taxation purposes. So here, when we add these two Kentucky fingers of the Southern System together, a remarkable result appears. And under this result, can be found the fundamental cause of the operation of the Southern-in-Ky. division. For when we add them together, the total Kentucky operations, per mile, are really more profitable than these of the entire system-unit. So that instead of the operations of the system within the bounds of Kentucky, being a losing venture and thereby taking from system earnings, and bringing outside earnings into Kentucky: the Kentucky mileage pays best. For the returns from the operations of the system in its operated mileage in Kentucky exceed the average mileage earnings of the whole unit for each of the two years. The result then must be very different: instead of bringing into Kentucky earnings from other states, the result is to equalize over the whole system, the large earnings which the system actually took in within the boundaries of this state. On such a showing Kentucky might have a right to make some actual reduction in the large terminal and double tracks values which were deducted as lying in other states ($62,868,941). But we have not asked for this, and believe that simple justice has been done when all the railroads of the state are assessed alike on a system basis.

To ask any special additional assessment because of the extra-profitable mileage of the System-within-Ken-

tucky, would complicate this record; and destroy the uniformity of assessment and taxation on which we have tried to base this whole proceeding. The present assessment merely gives to Kentucky, an average mileage valuation for the whole of the Southern System: allows for outside excess tangible valuation: adds nothing because the Kentucky mileage is on the whole much more prosperous than the system mileage. The very figures show that the assessment of the Kentucky operations of the system in the name of the two fingers of the whole is much less than its true valuation: less than the Kentucky earnings warrant, and less than the system earnings warrant.

It is earnestly submitted that intangible property has thereby been omitted from assessment; and that this omission came about because the system did not make the report required by law; and that the state is now entitled to assess the portion of property omitted.

Some years ago, a local attorney for a carrier made an interesting argument before the Kentucky Railroad Commission—he claimed that a tunnel ought not to be assessed as having any value whatever, that it was a liability, and not an asset, as it cost a great deal to build, and cost something to maintain; and further that no tunnel had ever been known to bring in a penny of revenue. And all of this was correct; yet the tunnel was taxed as having a tangible value because without it the railroad could not operate.

Equally interesting arguments might be advanced about certain bridges, long mileage lines between large cities, and some depots where revenues are small. Following this out, a railroad system would become (for purposes of taxation) only a few bright spots in which tariffs were collected. Yet such is not the case, for the value of the unit depends on its connections and the

places in which business may begin or in which deliveries may be made over a widely varied area.

Therefore when the Southern System has come into Kentucky, and does business in Kentucky, the system operation is in the state. Now while the system comes in for operation under its own rules, it must come in for taxation like other common carriers and corporations performing a public service. It must have its tax schedule figured like all similar tax payers. The Southern System is operating in Kentucky. And whether it operates in Kentucky under one, two or three names; or by other accounting, the result for taxation must be the same. It must be taxed on a unit basis—not on a quarter sawed basis—and especially not on a quarter-sawing of its own making. So when the system-unit enters Kentucky to operate as it did when it took over the C. N. O. & T. P. by stock ownership, it became liable for unit assessment in Kentucky like other railways; unless the result is so arbitrary and excessive as to be confiscatory.

This appeal shows that the system mileage lying within the boundaries of Kentucky is worth more per mile and earns more per mile than the ten thousand miles of which it is a part. So the result is that a uniform method of assessment averaging the valuation of earnings throughout the entire Southern System in fact lets out of Kentucky, excess values earned therein: and necessarily cannot bring into Kentucky earnings collected from parts of the system.

It is our earnest contention that under the new pleading and the additional evidence; that the assessment is modest—not arbitrary: that it is for a smaller amount by a half million dollars than we are actually entitled: and instead of being excessive, it is smaller than the earnings might indicate. Instead of bringing into Kentucky, values which have been earned outside,

the judgment actually spreads Kentucky earned monies over the system-unit and takes values earned in Kentucky to the system's help. Besides it is submitted that such an assessment is more than proper because it is made on exactly the SAME basis as other taxpayers performing a public service.

That the parent corporation may be taxed on the property held for it by subsidiary corporations is well settled. Hart Steel Co. v. R. Supply Co., 244 U. S. 294; Southern Pacific Co. v. Lowe, 247 U. S. 330; Chicago Etc., R. Co. v. Minn. Assoc., 247 U. S. 490; Gulf Oil Co. v. Lewellyn, 248 U. S. 71; U. S. v. Phillis, 257 U. S. 156, and see especially Commonwealth v. Southern R. Co., 193 Ky. 479-488.

Appellant concealed the truth from the board and went before the state board and obtained an inadequate assessment of the line running from Cincinnati to the South. If the true facts had been disclosed to the board a very different assessment might have been made. That the assessment was wholly inadequate is shown by the facts which are now presented. When appellant is credited on the assessment now made by the amount of that assessment, it has received all that it can justly claim and no injustice will be done. This is necessarily the proper rule, for otherwise the state would have no remedy where the truth was fraudulently concealed and partial assessments made of subsidiary corporations when the thing really to be assessed was the parent corporation. Equity regards that as done which ought to be done and looks past the nominal parties to the real parties to the substance and essence of things. Seymour v. Springs, Etc., Assoc., 144 N. Y. 333; Hitchman Coal Co. v. Mitchell, 245 U. S. 299.

Stress is placed on the fact that the assessment now before the court is in the same amount as the assessment heretofore before this court. But as shown by that

opinion the assessment was then held confiscatory on the ground that it was an assessment only of the 127 miles of road between Louisville and Danville. The assessment now before the court, while in the same amount, is an assessment of all the roads in Kentucky, or 424.64 miles of road.

(The assessment was properly made against appellant and no injustice was done.) The assessments are in these words:

YEAR ENDED JUNE 30, 1917, ON WHICH TAXES FOR THE YEAR 1918 WERE BASED.

Net railway operating income, Southern Ry. Co., Va., and owned, operated, leased and controlled roads		$31,806,408.49
Net railway operating income C., N. O. & T. P.		4,970,326.01
		$36,776,734.50
Capitalized at 7%		$525,381,921.43
DEDUCT: Total outside excess tangible values, i. e. shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated, leased and controlled roads	$67,832,331.71	
Total outside excess tangible values, i. e. shops, terminals, and double tracks C., N. O. & T. P.	1,019,582.15	
		68,851,913.86
DEDUCT: Total tangible outside values, we have		$456,530,007.57
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,761.36	
Entire mileage, C., N. O. & T. P.	337.27	
	$10,098.63	
Ky. mileage, Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	227.14	
Ky. mileage C., N. O. & T. P.	197.50	
	$424.64	
Proportion Ky. to total mileage 4.209%—4.209% of $456,530,007.57, gives total value in Ky.		19,215,348.02
Eqalized at 75%		14,411,511.02
Values heretofore paid on tangible and intangible property in Ky. by Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,053.00	
Values heretofore paid on tangible and intangible property in Ky. by C., N. O. & T. P.	9,181,368.00	
		$12,681,421.00
Omitted value Sou. Ry. Co., Va., franchise in Kentucky		$1,730,090.02

YEAR ENDED DECEMBER 31, 1918, ON WHICH TAXES FOR THE YEAR 1919 WERE BASED.

Net railway operating income Southern Ry. Co., Va., and owned, operated, leased and controlled roads		$32,969,380.58
Net railway operating income C., N. O. & T. P.		3,047,946.55
		$36,017,327.13
Capitalized at 7%		514,533,244.71
DEDUCT: Total outside excess tangible values, i. e. shops, terminals and double tracks of Southern Ry. Co., Va., and owned, operated; leased and controlled roads	$80,160,065.06	
Total outside excess tangible values, i. e. shops terminals and double tracks of C., N. O. & T. P.	2,046,735.53	
		$82,206,800.59
DEDUCT: Total tangible outside values, we have		$432,326,444.12
Entire mileage Southern Ry. Co., Va., and owned, operated, leased and controlled roads	9,601.83	
Entire mileage C., N. O. & T. P.	337.27	
	9,939.10	
Ky. mileage Southern Ry. Co., Ky., M. & O., Cumberland R. R. and Cumberland Railway	227.11	
Ky. mileage C., N. O. & T. P.	197.50	
	424.61	
Proportion Ky. to total mileage, 4.273%—2.273% of $432,326,444.12		18,473,308.96
Equalized at 85%		15,702,312.62
Values heretofore paid on tangible and intangible property in Ky., by Southern Co., Ky., M. & O., Cumberland R. R. and Cumberland Ry.	$3,500,512.00	
Values heretofore paid on tangible and intangible property in Ky., by C., N. O. & T. P.	9,173,208.00	
		12,673,720.00
Omitted value Southern Ry. Co., Va., franchise in Kentucky		$3,028,592.62

There has been no complaint that the assessment was not made just as all other like assessments and no error of fact was pointed out in the lower court. The errors referred to in the opinion of the Court of Appeals making the amount for one year too large and for the other year too small are due to clerical errors in copying figures; but this made the amount due less than it should be and appellant was not prejudiced. Such clerical errors may be corrected in Kentucky courts on motion, but no motion to correct has been made. Without this such an error can not be considered on appeal. Com. v. Caudill, 121 Ky. 537; Dodd v. Combs, 3 Met. 29.

4. THERE HAS NEVER BEEN ANY COMPLAINT THAT THE ASSESSMENT WAS NOT PROPERLY MADE.

It is the same as that before the Court of Appeals on the second appeal and no complaint of it was then made. The court expressly held "it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by the former opinion," Southern R. Co. v. Com., 204 Ky. 390. There was no complaint of this holding and no objection on this ground was urged when the case was next before the Court of Appeals. The former opinion simply adjudged that an assessment be made but did not fix any amounts. The reason the assessment for 1918 is so much larger than for 1917 is fully explained in the record. The assessments were made on a different basis. The facts are stipulated as follows:

> "5. Former stipulation No. 19 is erroneous. But it is true that for the year 1917 the property of all railroads in the State of Kentucky was equalized at 75% and for 1918 85%." (R. 183.)

During the war property values of all kinds went up. So it was that property was equalized at 75% in 1917 and at 85% in 1918. This was the rule in all assessments. When the gross value of appellant's intangible property was equalized at 85% and the deductions remained practically the same, plainly a much larger remainder was left than would have been left on a gross valuation of 10% less. All other corporations were taxed in the same way and appellants can not complain that it was taxed just as other taxpayers.

By sections 4021 and 4023, Kentucky Statutes, which are printed at the back of this brief, it is provided that the state shall have a lien on the property assessed for the taxes due thereon, and that the holder of the legal title, the holder of the equitable title, the claimant or bailee in possession of the property shall be liable for the taxes thereon, but as between themselves it shall be the duty of the holder of the equitable to list the property and pay the taxes thereon. The assessment here was directed to be made (R. 278). The liability was then fixed, no assessment may be made until that jugdment is carried into effect. At that time federal control had terminated and the property was in the possession of the railway company. It was its property and in its possession. The state had a lien on the property for the taxes so directed to be assessed and the claimant in possession or equitable owner is liable for the taxes. Here the real owner was in possession when the judgment was entered. The state could not enforce its lien upon the property unless the railway company was a party to the suit, it was therefore proper that the railway company should be made a party to the suit and the judgment against it was proper, for otherwise the state could have looked to nobody for its taxes but the Director General and he simply represents the United States government, which cannot be sued, except by its consent. Congress may repeal the Federal Control Act

tomorrow and leave the state without any remedy but for its lien on the property and its right to collect from the person in possession when the assessment is made. Section 15 of the Federal Control Act provides:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds."

As the Federal Control Act did not repeal, impair or affect the existing laws or powers of the states in relation to taxation, the Kentucky Statutes were not affected thereby. The provision as to the payment of the taxes from railway operation is only a provision for a mode of payment; when the taxes are not so paid under the express letter of section 15 the taxes may be enforced just as they would be if there had been no federal control. The cases cited for the plaintiff in error on this subject are in no wise in point. They were not tax claims arising two years after federal control ceased. The very purpose of section 15 was that the states might collect their taxes as before and should not be required to look alone to the federal government for them. Otherwise the state government might be unable to exist, for it could not enforce payment by the federal government. As we see it this is a question turning simply on the proper construction of the state statutes, which were expressly left unaffected by the Federal Control Act, and being only a question of the construction of the statutes given by the highest state court.

Appellant insists that its "Southern in Kentucky" line is 127 miles long. This is the length of its main line, but it has trackage rights bringing the total to 165 miles. It insists that its total mileage is 8,914.22. Plainly

the mileage in Kentucky and the total mileage must be counted on the same basis. If trackage rights are counted to make the total mileage they must be counted in the Kentucky mileage. The 8,914.22 total mileage includes 564.06 miles of trackage rights (R. 71 & 87), of which 38.9 are in Kentucky (R. 101). The proportion would not be seriously affected if trackage rights are left out, in and out of Kentucky; but plainly appellant can not count them out of Kentucky and not in Kentucky, as it has insisted on doing in this court and in the United States Supreme Court, which did not have before it the stipulations and pleadings since filed.

The 20% penalty was properly adjudged. While the 20% is called a penalty in the statute, it is provided that 15% goes to the officer prosecuting the proceeding for his services and only 5% goes into the treasury. The same provision is made in the judgment appealed from (R. 278). The cost of the collection must be borne either by the state or by the taxpayer. It is only just that he should pay this cost, rather than the other taxpayers of the state. To this extent the 20% though called a penalty is simply a provision for costs. The remaining 5% goes into the treasury and is the only interest the state receives on its delayed taxes. In Missouri Pacific v. Ault, U. S. 554, interest at 6% per annum on the amount found due was allowed against the Director General from July 29, 1918, until paid. In this case all the interest charged for a greater delay is 5%. This is certainly not punishment. It is only compensation for the delay in payment and is less than one year's interest. In fact the 20% is less than the interest allowed in the Missouri-Pacific case for the delay. To call this punishment is to trifle with words. The penalties held not enforceable in the Ault case are thus defined.

"But double damages, penalties and forfeitures which do not merely compensate but punish, are not

within the purview of the statute." The Owens case, 256 U. S. 225, is to the same effect.

The 20% here simply compensates the officer for his services and the state for the interest it has had to pay on the state warrants. The fact is the state is not made whole. In the Ault case, Ault got his $50.00 with legal interests. He was only denied $390.00 as a penalty in addition to this. The penalty was practically seven times the amount of his claim. That was plainly punishment, but not so is a provision for payment of costs and 5% for delay in paying taxes.

> "It is the legal duty of every person liable for taxes to pay the same when due, and the power of the state to impose on the taxpayer penalties for non-compliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, can not be doubted. And if the state is compelled to resort to legal proceedings for the collection of its taxes it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case." 26 R. C. L. p. 386, Sec. 344.

To deprive the officer of compensation in these proceedings is to nullify the statute authorizing such proceedings, for certainly officers will not so act without pay. They are liable for costs if unsuccessful. Plainly the statute does not mean that the state shall be without remedy in this class of cases.

Federal control began on 27th day of December, 1917, and ended on the 1st day of March, 1920.

This is a mere assessment proceeding. It was proper to make the railroad company and the Director General defendants that both might be heard. The judgment properly made the assessment against both. This was for the protection of the company. Their rights as between themselves may be settled when their accounts are settled.

The whole spirit and purpose of the control act in relation to taxation was to provide against any conflict with the existing laws or powers of the state. The state may collect its taxes and the reasonable costs of collection are a part of the tax, so is interest on taxes delayed in payment. The allowance of 20% in cases like this was provided for by the state laws for this reason. The Federal Control Act in providing that it should not affect, amend, repeal or impair the tax laws of the state necessarily leaves unaffected the taxes and the rights of the state incidental to their non-payment, such as the right to cost and interest for the delay. The Federal Act was aimed at the removal of such things only as interfered with its designated purposes. The taxation of this property was provided for under the laws of the state that then existed and those laws also provided for the payment of the costs and compensation for the delay. Under no stretch of the imagination can it be contended that taxation of railroad property impeded the movement of troops or material. Therefore the Federal Control Act has no bearing whatever on this case. Especially is this true since the assessment here was made long after Federal control ceased. These assessments do not bear interest in Kentucky.

To sustain this point is to hold that the cost of the delayed assessment must be borne by the other taxpayers of the state and not by the property taxed, and that no allowance may be made to the state for interest on the taxes, the payment of which has been delayed.

Appellants insist that the fault here was that of the director general and that under the statute there is no liability for the 20% penalty. But this is to overlook the nature of the case. The director general did not take possession until December 31, 1917. The basis of the action is the failure of the corporation to report as required by Sec. 4070, Kentucky Statutes. If the corpora-

tion had not concealed the facts the action would not have been brought. By the statute the reports were required to be filed between the 15th day of September and the 1st of October. The reports for 1917 were to be made in September, 1917, or long before the director general was appointed; so he had nothing to do with this report, but only the corporation. The corporation should have made a report in 1918, but failed to do so. When the director general came in he had no means of knowing the secret facts which the company had not disclosed, and it was still its duty to make the report, for it was the taxpayer and knew the facts. By Section 4086 the corporation was required to pay its taxes at the same time as individuals were required to pay. By Sec. 4052, Kentucky Statutes, all property is assessed and valued as of September 15, and by Secs. 41, 43, Kentucky Statutes, all taxes are due on the first of March after the assessment.

In conclusion we submit that these things stand admitted:

1. It stands admitted that the statute is valid.
2. It stands admitted that appellant owns, operates and controls 424 miles of railroad lines in Kentucky.
3. It stands admitted that the assessment made by the lower court is made just as the statute provides and as all other assessments of railroad corporations were made.

Certainly it can not be maintained that this court decided on the former appeal that appellant may not be taxed as other like taxpayers or is conclusive of any such result. Certainly this groundless, persistent attempt to dodge taxation in Kentucky by the concealment of the facts by appellant and the ingenuity of its able counsel will not receive the approval of this court.

We earnestly submit that appellant's persistent effort to escape being taxed just as all other like taxpayers have been taxed should not be sustained by this court and that the judgment should be affirmed.

Respectfully,

J. W. CAMMACK,
Attorney General
L. W. MORRIS,
D. L. HAZELRIGG,
J. P. HOBSON,
for appellees.

We have also attached to this brief, the Kentucky Statutes involved, as Appendix A; and our Calculations as Appendix B.

APPENDIX A

Kentucky Statutes:

Sec. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation, or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one judisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board and shall convene the same from time to time as the business of the board may require.

Sec. 4078. In order to determine the value of the franchises mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section 4092 of this article, shall annually, between the fifteenth day of September and first day of October make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: "The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid for; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require."

Sec. 4086. All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay taxes due the State from them into the Treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as de-

faulting individuals, except where otherwise specially provided.

Sec. 4052. All taxable estate shall be assessed and valued as of the fifteenth of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same.

Sec. 4241. It shall be the duty of the sheriff or Auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to asessment a statement containing a description and value of the property proposed to be assessed, and the value of corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years after the filling of such statement, the clerk of the court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county, if not, then to his agent, attorney or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value

thereof at its fair cash value, estimated as is required by law; if not liable, he shall make an order to that effect. From so much of the order if the court deciding whether or not the property is liable to assessment, either party may appeal, as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to asessment or taxation. If the court shall decide that the property is liable to asessment, the clerk of the county court shall certify to the Auditor of Public Accounts and the sheriff a description of the property and the amount of the assessment for taxation, together with the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed, the officer filing his statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments in a book to be kept for that purpose, showing the date of the assessment, the name of the person against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment.

APPENDIX B.

THE EXACT AMOUNT OF OMITTED PROPERTY ASSESSIBLE TO THE SYSTEM UNDER THE PRESENT RECORD.

The present appeal is a new case, new in pleading, new in evidence. Running all the way through the brief, counsel for appellant keep returning to the word 'Identical.' It is true that the amounts assessd against appellant for both years are in the same amount as in the first appeal. But these assessments are *smaller* than the amounts really omitted; and smaller than the State is entitled under the new pleading and the new evidence.

All allegations concerning the Mobile & Ohio, the Cumberland Railway, and the Cumberland Railroad were withdrawn in the amended statement (R. 238 and 241). The various figures in the record had to be corrected to meet this change; and every figure in the system total had to be modified to some extent, especially,

(1) Mileage within and without Kentucky,
(2) Earnings within and without Kentucky,
(3) Tangible valuations outside of Kentucky,
(4) Assessed valuations by the Kentucky authorities.

The corrected figures for 1917 are:

System mileage (first appeal)	10,098.53 miles	(R. 262)
System mileage (present appeal)	8,914.22	(R. 276)
System earnings (first appeal)	$36,776,734.50	(R. 262)
System earnings (present appeal)	33,673,556.09	(R. 277)
Outside valuations (first appeal)	$68,851,913.86	(R. 257)
Outside valuations (present appeal)	62,868,941.86	(R. 277)

Ky. Assessments credited (first appeal)	$12,681,421.00	(R. 281)
Ky. Assessments credited (present appeal)	11,318,440.00	(R. 286)
Ky. Percentage of mileage (first appeal)	4.209%	(R. 258)
Ky. Percentage of mileage (present appeal)	4.075%	(R. 286)

The changes for 1918 run in like amounts, and appear on the same pages of the record.

At all stages of this proceeding, counsel have been in full agreement on these figures, and have only differed as to their effect. We quote from the amended answer, filed Nov. 2, 1928:

> "That the assessment of additional taxes as proposed in the amended statement filed herein based on the exclusion of all calculations of the three railroads operated in Kentucky which were owned by the defendant, Southern Railway Company, as hereinbefore set out, to-wit, the Mobile & Ohio Railroad Company, The Cumberland Railroad Company, and the Cumberland Railway Company, would result in an additional assessment for the year 1918 of $1,462,243.08; and an additional assessment for the year 1919 of $3,755,034.85;" (R 263.)

It will be noted that these figures which are assumed in the answer of the appellant, and again appear in Exhibit X (R. 286) as the judgment to which the State claimed to be entitled. The results are

1918	Omitted valuations	$1,462,243.08
1919	Omitted valuations	3,755,034.85
		$5,217,277.93

The total of these figures exceed the judgment by half a million dollars; and therefore the figures used in the judgment are to the prejudice of the State, not to the prejudice of the appellant, provided the State is entitled to any judgment at all.

Following out the method of computation, which has always been used by the state taxing authorities, and using the corrected figures, which entirely eliminate the M. & O. and the Cumberlands from the records, we have:

YEAR ENDED JUNE 30, 1917

On which the taxes for the year 1918 were based.

Net railway operating income (Exclusive of the M. & O. and the Cumberlands)		$ 33,676,536.09
Capitalized at 7%		481,050,801.00
Deduct: Total outside excess tangibles		62,869,941.00
		$418,181,860.00
System mileage (Exclusive of M. & O., Etc.)	8,914.22 miles	
Kentucky mileage:		
Southern in Kentucky	127.628 miles	
C., N. O. & T. P.	197.50	
Trackage	38.16	
	363.28 miles	
Proportion to Kentucky of system mileage—4.075% and 4.075% of $418,181,860 gives a total value in Kentucky of		$17,040,910.00
Equalized at 75%		12,780,683.08
Less assessed valuations (Exclusive of M. & O., Etc.)		11,318,440.00
System valuations in Kentucky—Omitted		$1,482,243.00

YEAR ENDED JUNE 30, 1918

On which the taxes for the year 1919 were based.

Net railway operating income (Exclusive of the M. & O. and the Cumberlands)		
Capitalized at 7%		$35,821,133.00
Deduct: Total outside excess tangibles		511,730,481.00
		76,196,015.00
		$435,534,466.00
System mileage (Exclusive of M. & O., Etc.)	8,914.22 miles	
Kentucky mileage:		
Southern in Kentucky	127.628 miles	
C., N. O. & T. P.	197.50	
Trackage	38.16	
	363.28 miles	
Proportion to Kentucky of system mileage—4.075% and 4.075% of $435,534,466.00 gives a total value in Kentucky of		
Equalized at 75%		$17,726,252.00
Less assessed valuations (Exclusive of the M. & O., Etc.)		15,367,314.00
System valuation in Kentucky—Omitted		11,312,260.00
		$3,755,034.00

Now assuming that our argument is correct, we take the liberty of re-casting the figures used by this court in its first opinion; copying in the first column from the first opinion and in the second column, the figures which we think proper in this appeal.

"The amounts so arrived at were assigned to the 127.63 miles of the Southern Railway in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans & Texas Pacific. The increase per mile for 1918 was $5,334.55 and for 1919 was $9,338.34," 274 U. S., at page 80.	*The amounts so arrived at were assigned to 165.78* miles of the Southern Railway in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans & Texas Pacific. The increase per mile for 1918 was $4,080.01 and for 1919 was $10,336.47.*
"The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway in Kentucky of $13,555 per mile for 1918, and of $23,730 for 1919.	*The amount adjudged to have been omitted equals an increase on the lines of the "Southern System" of $4,080.01 per mile for 1918, and of $10,336.47 for 1919.*

**38.91 trackage (R. 101).*

The 1917 average net operating income per mile for the system was the basis for determining the Kentucky franchise taxes for 1918, and the average for 1918 controlled the amount of the 1919 taxes. The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918. The corresponding net income per mile of the Southern Railway in Kentucky for 1917 was $878. There was a loss of $4,741 per mile in 1918. The record also shows a loss in each of the years 1914, 1915 and 1916. The average for the five years was a loss of $1,230 per mile per year.

The 1917 average net operating income per mile for the system was the basis for determining the Kentucky franchise for 1918, and the average for 1918 controlled the amount for the 1919 taxes. The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918. The corresponding net income per mile of the SYSTEM operations within Kentucky for 1917, $15,642.02, and was $4,274.98 for 1918. Accounted separately there was a loss on the Southern Railway in Kentucky, which was more than compensated for by the large system profits in Kentucky, arising from the unified operation of the system with the Cincinnati, New Orleans & Texas Pacific, and this unity of operation did not exist in 1914, 1915, or 1916.

If considered alone, the railroad of the Southern Railway in Kentucky would be a losing venture. 274 U. S. at page 82.

If considered alone, the railroad of the Southern Railway in Kentucky would be a losing venture, but when a unity of operation appears with the whole Southern System such operation cannot properly be considered alone, for the System operates as a unit and has two divisions in Kentucky.

In order to justify the increases made, there would have to be attributed to these lines large amounts from system earnings. 274 U. S. at page 83.

In order to justify the increases made, it would NOT be necessary to have anything attributed to Kentucky operations from the earnings in other states, since these Kentucky operations are admittedly more profitable than the system average.

"If intangible elements were attributed to the system at the same rate per mile as results from the distribution of the added amount to the mileage of the Southern Railway in Kentucky, their value would be more than $200,000,000 for 1919, and more than $120,000,000 for 1918. 274 U. S. at page 83."

If intangible elements were attributed to the Kentucky mileage in proportion to their earnings, it would mean that the assessment of the Kentucky mileage might be about double an average system mile, and the State here is asking only a uniform system assessment. Clearly there is nothing arbitrary or excessive in such an entire system valuation, when the income within Kentucky greatly exceeds the system earnings per mile.